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No. 89-1643

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

GORDON STRUBE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion when it refused to allow petitioner to withdraw his guilty plea on the basis of an alleged violation of his plea agreement.

2. Whether petitioner was properly convicted, upon his guilty plea, of acting as an accessory after the fact.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 14a-24a) is unpublished, but the decision is noted at 888 F.2d 130 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1989. A petition for rehearing was denied on January 23, 1990 (Pet. App. 12a-13a). The petition for a writ of certiorari was filed on April 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Central District of California to three counts of acting as an accessory after the fact to offenses committed by the corporation of which he is the chief executive officer and by one of the corporation's employees, in violation of 18 U.S.C. 3. The underlying offenses were one count of making a false claim upon an agency of the United States (18 U.S.C. 287) and two counts of making false statements in a matter within the jurisdiction of an agency of the United States (18 U.S.C. 1001). Petitioner was sentenced to six months' custody in a community treatment center, to be followed by five years' probation, and was fined $300,000.

1. Petitioner is the founder and chief executive officer of Consolidated Aeronautics Corporation (CAC). In 1987, a grand jury began an investigation into CAC's sales of aircraft parts to the United States government in 1985 and 1986. Pet. App. 15a.

Ultimately, CAC, Ronald Guy (a CAC vice president), and petitioner entered into a plea agreement with the United States, under which petitioner agreed to plead guilty to three counts of a five-count information. The information charged CAC and Guy (1) with conspiring to defraud the United States by entering contracts to sell the government new and unused military aircraft parts and then supplying used, reconditioned, and refurbished parts instead, and (2) with various false certifications and claims for payment in connection with the contracts. Each of the counts in which petitioner was charged alleged that, acting with knowledge that a particular false statement or false claim had been made, petitioner "relieved, comforted

and assisted" CAC and Guy "in order to hinder and prevent their apprehension, trial and punishment." Pet. App. 15a-16a, 32a-38a. In exchange for the defendants' guilty pleas, the government agreed not to bring any additional criminal charges against CAC or its officers and employees. The plea agreement also provided that "[a]s to [petitioner], the government will not recommend at the time of sentencing a total period of incarceration of more than one year." Pet. App. 15a-16a, 40a-41a.

a. At the plea proceeding, in accordance with Fed. R. Crim. P. 11(f), the district court inquired into the factual basis for each defendant's plea. The prosecutor represented that the government's evidence would show an "overall conspiracy" consisting of "a pattern with some of the contracts of Consolidated Aeronautics Corporation to supply reconditioned, refurbished, remanufactured and on occasion used parts when government contracts called for the supply of new and unused parts." Pet. App. 61a. CAC, the prosecutor continued, would also falsely certify that the parts supplied were in compliance with the contract and would submit claims for payment that were false for the same reason. *Ibid.* With respect to petitioner, the prosecutor stated (*id.* at 63a):

> [Petitioner] – and I think the factual basis will be expanded on by [petitioner's attorney and petitioner] – knew what was going on at the time and did nothing to stop this particular pattern; indeed, assisted by lack of action and lack of intent to put an end to this particular path and, therefore, in the government's view, could be found guilty of 18 USC Section 3 in connection with the false statement [charged in Count 2 of the information].

The prosecutor relied upon the same theory of culpability with respect to the other two counts to which petitioner offered guilty pleas. *Id.* at 64a.

Petitioner's attorney disputed the prosecutor's account on two points. He denied that petitioner knew about the substitution of parts and the false certifications at the time, and he denied that petitioner "participated in the conduct as alleged in the Information – the substantive conduct as alleged in the Information." Pet. App. 65a. Rather, according to petitioner's counsel, petitioner "did not know of the [illegal] conduct at the time, nor did he actively participate in the conduct." *Ibid.* However, counsel continued, petitioner "did learn of the events that [the prosecutor had] recited and which appear in the Information" and "failed to bring them to the attention of the authorities – either the investigating authorities or the Government contracting officer who had cognizance of these contracts." *Id.* at 66a. Petitioner's attorney concluded, "I believe that constitutes a violation of [18 U.S.C. 3]." *Ibid.* Petitioner subscribed to his attorney's account, which was also recorded in a written submission executed by petitioner and his attorney.[1]

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[1] Defendants' Factual Basis for Guilty Plea to Information (filed May 9, 1988) [hereinafter *Defendants' Factual Basis*]. Consistent with the oral representations of petitioner's attorney, this submission asserted that petitioner had no contemporaneous involvement in the underlying offenses to which he acted as an accessory (*id.* at 2-3):

> In approximately January 1986 and later, [petitioner] learned from other officers of CAC who had primary responsibility for the U.S. Government contracting business that CAC had supplied "newly manufactured material" to the government in connection with certain "selector set" contracts even

Drawing upon the accounts of both the prosecutor and petitioner's attorney, the district court found a factual basis for petitioner's guilty plea (and those of the co-defendants) "on the basis of, one, the proffer made by [the prosecutor]; two, as qualified by various counsel as to parts of their proffer to which they disagree; and, three, including the factual basis as set forth in the pleading just filed by the defendants." Pet. App. 69a.

b. Prior to petitioner's sentencing, the government filed a sentencing memorandum, in which it recommended a sentence for each of the defendants. In an introduction, the memorandum made the following recommendation for petitioner (Pet. App. 71a):

> For the reasons set forth more fully herein, the government recommends the following sentences:
>
> * * * * *
>
> [Petitioner]: A jail sentence of one year and a fine of $625,000[.]

After a discussion of the facts, the memorandum also stated (*id.* at 16a, 73a):

> It is submitted that CAC's long ingrained practice of selling defective parts was known to and orchestrated by [petitioner]. But for his age and health, a long prison sentence would be called for.

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though the contract specifications called for the material to be "new, unused surplus." Further, [petitioner] learned at that time that certifications had been submitted to the government by CAC personnel which falsely affirmed that the product supplied was "new, unused surplus," when, as [petitioner] learned after the fact, the product was "newly manufactured" material. (This applies to the contracts referred to in counts two, three and five of the Information.)

> Nevertheless, some prison is warranted to deter [petitioner] and other corporate executives who attempt to hide behind their employees. The government submits that [petitioner] should be sentenced to a prison term of at least one year.

Petitioner moved to withdraw his guilty plea, contending that the sentencing memorandum's use of the phrase "at least one year" violated the government's promise in the plea agreement not to recommend "a total period of incarceration of more than one year." Pet. App. 16a. The district court rejected this contention, finding that the memorandum recommended only one year of incarceration. The court explained that it understood the sentencing memorandum to acknowledge "that while [the prosecutor] can't recommend more, he is going to recommend one year. That is what I believe and that is the way I interpreted it." *Id.* at 28a. The court added that even if there had been a breach of the agreement, the proper remedy would have been to resentence petitioner before another judge, not to allow him to withdraw the plea. *Ibid.* In seeking to withdraw the plea, petitioner did not challenge the sufficiency of the information, argue that he had not committed the offenses with which he was charged, or challenge the factual basis for his guilty plea.

The court sentenced petitioner to serve six months in a community treatment center. The court also imposed a five-year term of probation, a community service obligation, and fines totalling $300,000. Pet. App. 29a-31a.

2. On appeal, petitioner argued that he should have been permitted to withdraw his guilty plea (1) because the factual basis elicited during the plea

proceeding did not establish that he had committed any affirmative act to assist the other defendants in attempting to avoid detection, and (2) because the prosecutor's sentencing memorandum violated the plea agreement. The court of appeals rejected these contentions and affirmed. Pet. App. 14a-24a.

With respect to the sufficiency of the factual basis for the plea, the court found that the record before the district court justified the conclusion that after learning of his employees' illegal activity, petitioner had engaged in "obstruction of justice by providing a safe harbor for the criminal action and concealing their ongoing crimes for personal or corporate profit." Pet. App. 20a. The court of appeals concluded that the district court had "faithfully complied with the requirements of Rule 11(f)." Pet. App. 21a.

The court of appeals also rejected petitioner's claim that the government had breached the plea agreement. The court noted that the district court "construed the prosecutor's recommendation, as clarified by his oral statements, as being in compliance with the terms of the plea agreement." Pet. App. 23a. The panel also upheld the district court's understanding of the intent of the agreement – *i.e.*, that "the prosecutor could not recommend more than one year, but was free to argue that the sentence should not be less than one year." *Id.* at 24a. The court of appeals held that the district court had not abused its discretion when it denied petitioner's motion to withdraw his guilty plea. *Ibid.*

ARGUMENT

1. Petitioner seeks further review of the questions whether the government is obligated to "comply with the literal terms of plea agreements" and whether the government may seek to "cure its breach of a plea agreement" after the defendant has moved to withdraw his plea. Pet. i. On the facts as found by the lower courts, neither of these questions is properly presented. The district court concluded that the government had not breached the plea agreement, explaining that the prosecutor had "acknowledge[d] that while he can't recommend more, he is going to recommend one year." Pet. App. 28a. The court of appeals upheld the trial court's determination that the plea agreement permitted that type of recommendation. *Id.* at 24a. The correctness of the district court's determination that the sum and substance of the prosecutor's recommendation was "one year and no less" as opposed to "one year or more" presents no issue calling for this Court's review.

Even though the sentencing memorandum stated at one point that petitioner "should be sentenced to a prison term of at least one year" (Pet. App. 73a), it would have been unreasonable for the district court to conclude from the memorandum as a whole that the government was recommending more than one year's incarceration. The same memorandum also clearly stated that the government was recommending "[a] jail sentence of one year" for petitioner. Pet. App. 71a. Moreover, when it received the sentencing memorandum, the district court was well aware that petitioner's plea agreement obligated the government not to "recommend at the time of sentencing a total period of incarceration of more than one year." *Id.* at 40a. Under these circumstances, the court sensibly refused

to interpret the memorandum in the manner the petition advocates – *i.e.*, to embody two separate and inconsistent recommendations, one of which would violate the plea agreement. Instead, the court read the phrase "at least one year" to express the government's position that petitioner should be sentenced to serve one year of imprisonment and no less. That interpretation was fully consistent with all of the statements in the sentencing memorandum as well as the plea agreement.[2]

In response to petitioner's motion to withdraw his plea, the prosecutor confirmed that it was his intention to recommend a prison term of one year, and he offered to delete the words "at least" from the memorandum. See Pet. App. 23a. As the court of appeals noted, the prosecutor's response to the motion simply "clarified" his recommendation (*ibid.*) – by removing any possible doubt as to the intent of the sentencing memorandum. The prosecutor did not concede that the sentencing memorandum breached the plea agreement,

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[2] That interpretation was also supported by the context in which the words "at least one year" appeared. Shortly before, the memorandum argued that "[b]ut for [petitioner's] age and health, a long prison sentence would be called for" and that "some prison is warranted." Pet. App. 73a. As the district court suggested, the clear implication was that the government was arguing for "some prison" (*i.e.*, one year) and emphasizing that this recommendation took account of petitioner's poor health.

A district court's determination of the terms of a plea agreement is a finding of fact that may be reversed only for clear error. See *United States* v. *Barrett*, 890 F.2d 855, 863-865 (6th Cir. 1989); *United States* v. *Caporale*, 806 F.2d 1487, 1516 (11th Cir. 1986), cert. denied, 482 U.S. 917 (1987); *United States* v. *Sutton*, 794 F.2d 1415, 1423 (9th Cir. 1986); *United States* v. *Khoury*, 755 F.2d 1071, 1073 (1st Cir. 1985).

and he therefore did not seek to cure any such breach. When the district court pronounced sentence, petitioner received all that he had coming under the agreement – sentencing by a judge who understood that the government was recommending no more than one year of incarceration.

The court of appeals' decision presents no issue of general importance calling for this Court's review. In particular, contrary to petitioner's contention (Pet. 13-17), it does not conflict with decisions of other courts of appeals holding that the government is obligated to comply with the terms of a plea agreement. The court of appeals acknowledged that the government "must be held to the literal terms of the [plea] agreement," Pet. App. 22a, but simply chose not to disturb the district court's determination that the government's sentencing recommendation complied with the terms of the agreement. Other courts of appeals have also refused to reverse convictions on similar facts. See *United States* v. *Januszewski*, 777 F.2d 108, 109-111 (2d Cir. 1985) (government's agreement to recommend a sentence "not to exceed six years" was not violated by prosecutor's statement that "*nothing less than* six years would be an appropriate disposition"); *United States* v. *Bullock*, 725 F.2d 118, 118-119 (D.C. Cir. 1984) (government's recommendation in presentence memorandum of sentence of "at least" 10 to 30 years did not necessitate reversal of conviction, notwithstanding plea agreement under which the government undertook not to request sentence exceeding 10 to 30 years).

The question whether a defendant may withdraw a plea of guilty prior to sentencing is "committed to the sound discretion of the trial court." *United States* v. *Navarro-Flores*, 628 F.2d 1178, 1183 (9th Cir. 1980);

see *United States* v. *Pitino*, 887 F.2d 42, 46 (4th Cir. 1989); *United States* v. *Boyd*, 610 F.2d 521, 524 (8th Cir. 1979), cert. denied, 444 U.S. 1089 (1980). The district court did not abuse its discretion in this case when it denied petitioner's motion for leave to withdraw his guilty plea.[3]

2. Petitioner also contends that the record will not sustain his convictions for acting as an accessory after the fact, in violation of 18 U.S.C. 3. Pet. 21-28.[4] He argues that the information was defective because it charged him with misconduct occurring during the commission of the underlying offenses and that the court of appeals upheld his conviction on the same basis. *Id.* at 9-10, 13, 21 n.5, 23. As petitioner concedes, this issue was not presented to either of the lower courts. *Id.* at 21 n.5.

a. Because petitioner did not challenge the sufficiency of the information in the district court, he has

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[3] Even if the district court had erred in its conclusion that there was no breach of petitioner's plea agreement, the choice of the appropriate remedy would be a matter within that court's discretion. See, *e.g.*, *United States* v. *Moscahlaidis*, 868 F.2d 1357, 1363 (3d Cir. 1989); *United States* v. *Tobon-Hernandez*, 845 F.2d 277, 280-281 (11th Cir. 1988); *United States* v. *Bowler*, 585 F.2d 851, 856 (7th Cir. 1978). Cf. *Mabry* v. *Johnson*, 467 U.S. 504, 510-511 n.11 (1984). In this case, the district court has determined that the proper remedy would be resentencing. Pet. App. 28a.

[4] That statute provides, in pertinent part:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

waived any objection to its terms other than "that it fails to show jurisdiction in the court or to charge an offense." Fed. R. Crim. P. 12(b)(2); see Fed. R. Crim. P. 12(f). Moreover, in determining whether the information sufficiently charges a violation of 18 U.S.C. 3, the information must be liberally construed in favor of validity. Because petitioner failed to challenge it on a timely basis, his convictions should not be reversed "unless the [information] cannot within reason be construed to charge a crime." *United States* v. *Vanover*, 888 F.2d 1117, 1120 (6th Cir. 1989). Accord, *e.g.*, *United States* v. *Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); *United States* v. *Rivera*, 879 F.2d 1247, 1251 n.3 (5th Cir.), cert. denied, 110 S. Ct. 554 (1989); *United States* v. *Phillips*, 869 F.2d 1361, 1364-1365 (10th Cir. 1988), cert. denied, 109 S. Ct. 2074 (1989); *United States* v. *Mallen*, 843 F.2d 1096, 1102 (8th Cir.), cert. denied, 488 U.S. 849 (1988); *United States* v. *Johnson*, 805 F.2d 753, 758 (7th Cir. 1986).

The information in the case clearly satisfied that standard. Each count to which petitioner pleaded guilty alleged that CAC and one of its officers submitted a false certification or false claim to the government and that petitioner, "knowing that the [underlying] offense *had been committed*, received, relieved, comforted and assisted [the co-defendants] in order to hinder and prevent their apprehension, trial and punishment." Pet. App. 35a-38a (emphasis added). None of these counts can fairly be read to allege that petitioner assisted his co-defendants, if at all, only in their commission of the underlying offenses, and each of them adequately set forth all the elements of the offense of acting as an accessory after the fact. See *Hamling* v. *United States*,

418 U.S. 87, 117 (1974). Read in its entirety and "construed according to common sense," see *United States* v. *Normandeau*, 800 F.2d 953, 958 (9th Cir. 1986), the information charged that, after becoming aware that the underlying offenses "had been committed," petitioner subsequently assisted the principals in their attempt to avoid detection.[5]

b. Neither of the lower courts acted upon the misconception that petitioner could be convicted of

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[5] The fact that the information alleged that the underlying offenses had been committed in the district "[o]n or about" particular dates and that petitioner had acted as an accessory "[a]t said time and place" (Pet. App. 35a-37a) does not suggest that the information cannot reasonably be construed to charge a crime. Cf. *United States* v. *Beebe*, 792 F.2d 1363, 1366 (5th Cir. 1986) ("indictment's validity is determined by a practical, not technical, reading of the indictment as a whole"); *United States* v. *Gironda*, 758 F.2d 1201, 1209 (7th Cir.) (in reviewing sufficiency of indictment, court must "consider the challenged count as a whole and * * * refrain from reading it in a hypertechnical manner"), cert. denied, 474 U.S. 1004 (1985). The information plainly alleges that petitioner was being prosecuted because of what he did "knowing that [each underlying] offense had been committed" (Pet. App. 35a-37a).

In addition, it is well established that a charging instrument's allegations regarding the date that a crime has been committed are not material unless time is an essential element of the offense; thus, proof that an offense occurred at a point in time different than that alleged ordinarily does not constitute a variance requiring reversal of a conviction. See, *e.g.*, *United States* v. *Young*, 862 F.2d 815, 818-819 (10th Cir. 1988); *Russell* v. *United States*, 429 F.2d 237, 238 (5th Cir. 1970); *United States* v. *Covington*, 411 F.2d 1087, 1088-1089 (4th Cir. 1969). *A fortiori*, in view of petitioner's failure to challenge the information, any defect in its allegations as to time cannot now be invoked as the basis for reversing his convictions.

acting as an accessory based solely upon assistance in the commission of the underlying offenses. In finding a factual basis for petitioner's guilty pleas, the district court drew upon the submissions of both the prosecutor and petitioner's counsel – *i.e.*, the prosecutor's proffer "as qualified by various counsel as to parts of [the] proffer to which they disagree * * * including the factual basis as set forth in the pleading just filed by the defendants" (Pet. App. 69a).[6] Although the district court did not specify the precise set of facts on which it relied in accepting the plea, its express reference to petitioner's version of his activities forecloses any contention that the plea was accepted on the basis of

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[6] Fed. R. Crim. P. 11(f) provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Under the express terms of this rule, the factual basis for petitioner's plea need not be drawn solely from his or his attorney's admissions on the record, but may include the prosecutor's proffer and sentencing memorandum, the presentence report, and the remainder of the record. See, *e.g.*, *United States* v. *Montoya-Camacho*, 644 F.2d 480, 485-486 (5th Cir. 1981).

Moreover, even if the record prior to the entry of judgment upon petitioner's pleas were insufficient to establish a factual basis, petitioner would not thereby be entitled to withdraw the plea. Because petitioner has never contended that his plea was other than knowing and voluntary, the appropriate remedy for any inadequacy in the factual basis shown upon the record would be a remand to the district court to enable that court to determine whether on a more complete record a factual basis could be shown. See *United States* v. *Allen*, 804 F.2d 244, 248 (3d Cir. 1986), cert. denied, 480 U.S. 922 (1987); *United States* v. *Goldberg*, 862 F.2d 101, 106-108 (6th Cir. 1988).

petitioner's having aided and abetted the commission of the underlying offenses.

The central theme of petitioner's submission, epitomized by the written factual basis he filed with the court, was that petitioner's misconduct postdated the submission of the relevant false statements and claims (*Defendants' Factual Basis* 2-3 (emphasis added)):

> In approximately January 1986 and later, [petitioner] learned from other officers of CAC who had primary responsibility for the U.S. Government contracting business that CAC *had supplied* "newly manufactured material" to the government in connection with certain "selector set" contracts even though the contract specifications called for the material to be "new, unused surplus." Further, [petitioner] learned *at that time* that certifications *had been submitted* to the government by CAC personnel which falsely affirmed that the product supplied was "new, unused surplus," when, as [petitioner] learned *after the fact*, the product was "newly manufactured material."

Petitioner's plea was not offered or accepted on the assumption that he violated the law, if at all, only in the commission of the underlying offenses themselves.

Nor was the court of appeals' affirmance based upon such a theory of criminal culpability. On appeal, petitioner contended that the factual basis for his plea was inadequate *only* because the record did not establish that he had committed an affirmative act in assisting his co-defendants to conceal their offenses. See Pet. App. 6a. The court rejected that contention, but it did not hold that petitioner had provided assistance, if at all, only in the commission of the offenses themselves. Rather, it noted that the prosecutor had

been prepared to prove that "with knowledge that his codefendants *had filed prior false claims*, [petitioner] permitted his employees to continue to file false claims." *Id.* at 7a (emphasis added). Petitioner's guilty plea was valid, the court of appeals concluded, because "the [district] court's inquiry adequately established that [petitioner] had knowledge of the offenses with which he was charged, that he comforted and assisted his employees in continuing to file false claims *after he had knowledge of their prior illegal activity*, and that he understood the consequences of his plea." *Id.* at 8a (emphasis added).

There is thus no support whatever for petitioner's assertion (Pet. 23) that "[t]he facts as found by the Court of Appeals establish that petitioner's acts upon which the plea was taken all occurred *before* the completion of the underlying offenses." Nor did the court find "that petitioner had assisted the company and its employee during the commission of their offenses" (*ibid.*). The court's unpublished memorandum opinion does not extend the offense of acting as an accessory

after the fact and thus does not call for this Court's review.[7]

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[7] According to the prosecutor's proffer, the conspiracy alleged in Count 1 continued through the end of October 1987. Pet. App. 60a. The substantive offenses as to which petitioner was alleged to have served as an accessory after the fact were committed on April 9, 1985 (Count 2), March 20, 1986 (Count 5), and April 4, 1986 (Count 3). The written factual basis filed on petitioner's behalf represented that he had learned of CAC's illegal activities "[i]n approximately January 1986 and later." *Defendants' Factual Basis* 2. These facts (together with the prosecutor's proffer and other materials in the record) justify the conclusion that petitioner became aware of each false statement or claim in turn and acted as an accessory in the manner described by that court. The accessory statute "makes no exception for persons who are present at the scene of the crime, or who may have participated in the planning or execution of the offense." *Smith* v. *United States*, 306 F.2d 286, 287 (D.C. Cir. 1962). Cf. *United States* v. *Van Scoy*, 482 F.2d 347, 349 (10th Cir. 1973) (upholding conviction for acting as an accessory after the fact to bank robbery upon indictment which charged defendant with that offense and aiding and abetting the same robbery); *United States* v. *Day*, 533 F.2d 524 (10th Cir. 1976), cert. denied, 444 U.S. 902 (1979). Thus, the factual basis for petitioner's guilty pleas was not undercut by the possibility that the record could also have warranted an inference that he participated in the commission of the underlying offenses. A defendant who agrees to plead guilty to acting as an accessory after the fact – a lesser offense than aiding and abetting that carries distinct advantages for the defendant in terms of sentencing and other matters – should not be permitted to argue that any ambiguities in the record must be resolved in favor of the more serious offense to which he did not plead guilty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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